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NO. 82-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., LARRY C. FLYNT, LFP, INC. and L.F.P., INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR PETITIONER

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Questions Presented

1. Where the requirements of a state's long-arm statute have been met, and the court would have personal jurisdiction of a suit by a resident plaintiff against the defendants, does the due process clause of the United States Constitution nevertheless prohibit that state from exercising personal jurisdiction over the defendants merely because the plaintiff is not a resident of the forum?

2. Where a plaintiff suffers damages in the forum by activity taking place there, is the right of the forum state to exercise jurisdiction over the wrongdoer for such activity prohibited by the due process clause of the United States Constitution merely because the plaintiff is not a resident of the forum?

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals (Pet. 11a-20a) is reported at 682 F.2d 33. The opinion of the District Court (Pet. 2a-8a) is not officially reported.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on June 16, 1982. The petition for a writ of certiorari was filed on September 14, 1982, and was granted on January 24, 1983. The jurisdiction of this Court was invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

The First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States (Pet. 21a), New Hampshire's Criminal Defamation Statute, R.S.A. 644.11 (Pet. 21a) and the relevant portion of New York's long-arm statute (Pet. 22a) are set out in their entirety in the appendix to the petition. New Hampshire's long-arm statutes, R.S.A. 300:11-15 and R.S.A. 510:4 are appended in full to the opinion of the Court of Appeals (Pet. 19a-20a).

Statement of the Case

In April 1977, Kathy Keeton, a resident of New York, brought an action in the Franklin County Court of Common Pleas of Ohio for libel and invasion of privacy against Hustler Magazine, Inc. and its publisher, Larry C. Flynt. She was joined as plaintiff in that action by Robert C. Guccione, the publisher of Penthouse Magazine. The complaint alleged that Hustler and Flynt had waged an unrelating campaign of malicious libel against the plaintiffs which culminated in a cartoon published in the May 1976 issue of Hustler Magazine that, *inter alia*, accused Guccione of infecting Keeton with a venereal disease (8a).

In May 1978, Keeton's cause of action for libel was dismissed as barred by the Ohio statute of limitations.

Keeton did not appeal because she believed that substantially the same damages could be recovered in her suit for invasion of privacy. However, literally on the eve of trial, on February 19, 1980, the Ohio trial court dismissed Keeton's invasion of privacy claim on the theory that the New York statute of limitations was migratory and barred her claim. That order was entered on February 28, 1980 and Keeton filed a Notice of Appeal on March 20, 1980. On September 30, 1980, the Franklin County Court of Appeals affirmed the dismissal of Keeton's privacy claim, based upon the application of the New York statute of limitations (54a-70a).

Keeton promptly commenced this action in the United States District Court for the District of New Hampshire on October 21, 1980.* The jurisdiction of the New Hampshire district court was invoked under 28 U.S.C. §1332—the plaintiff is a resident of New York, the individual defendant a resident of California and the remaining defendants are Ohio corporations.

In an opinion issued on June 18, 1981 (Pet. 2a-8a), the district court granted defendants' motion to dismiss on the ground of lack of personal jurisdiction. The district court found that while defendants' activities in New Hampshire may have been sufficient to satisfy that state's long-arm statute—particularly since such contacts with New Hampshire "were not random, isolated or transitory" but were "purposefully directed at New Hampshire" (Pet. 5a)—plaintiff's minimal contacts with the forum and the absence of a state interest in protecting nonresidents from

* This action asserts libel resulting from the scurrilous cartoon published in the May 1976 issue of Hustler Magazine, as well as publication of nude photographs of a 50 year-old "centerfold" in the September 1975 issue of Hustler, falsely identified as Kathy Keeton, and several subsequent issues of the magazine reprinting or referring to those same photographs (3a-33a).

defamation made it unfair as a matter of due process to permit New Hampshire to assert jurisdiction over the defendants.

The First Circuit Court of Appeals affirmed on June 16, 1982 (Pet. 11a-20a), similarly holding that the due process clause of the federal constitution prohibited the exercise of personal jurisdiction, even though the New Hampshire long-arm statute was satisfied and even though a resident of New Hampshire could have maintained such a suit.

Thus, the courts below have forced New Hampshire to discriminate against nonresidents in favor of residents, and to deny nonresidents access to its courts while granting residents access under identical circumstances. In short, the First Circuit has created two classes of United States citizens, one of which is to be favored over the other merely because of the happenstance of geography. Those who live within the forum state are first class citizens entitled to invoke the aid of the court—those who do not live within the forum state are second class citizens and are not entitled to invoke the aid of the court.

Summary of Argument

The courts below ruled as a matter of constitutional law that due process forbids the State of New Hampshire from exercising personal jurisdiction over the defendants in this defamation action, even though they have regularly marketed their magazines in that jurisdiction for many years, have launched their product into the stream of commerce with the expectation that the magazines will be purchased by New Hampshire readers, and have committed a tort in New Hampshire causing plaintiff to suffer at least some damage within that jurisdiction.

The First Circuit erroneously ruled that the factor of plaintiffs non-residence overcomes defendants' continuous contacts with the State to make it unfair as a matter of due process to require the defendants to respond to a lawsuit in New Hampshire. This approach improperly shifts the focus of the jurisdictional inquiry from the relationship among the defendants, the forum and the litigation to an impermissible emphasis on the fortuitous circumstance of plaintiff's residence. Such analysis is not only inconsistent with the prior rulings of this Court but, without adequate guidelines, adds another layer of confusion onto the "minimum contacts" balancing test, so as to make it impossible to determine in advance when due process will be satisfied.

I

The Court of Appeals improperly focused on plaintiff's lack of contact with the forum rather than on defendants' substantial contacts.

It is a distortion of the "fairness" test to close the doors of the New Hampshire courts once defendants' minimum contacts with that jurisdiction have been established. Such a holding impacts upon every case brought by a nonresident, and suggests a new, impermissible emphasis upon plaintiff's contacts with the forum—an approach inconsistent with the teaching of this Court.

The seminal case of *International Shoe Co.* v. *State of Washington,* 326 U.S. 310, 316 (1945), focused the due process analysis upon the *defendant's* contacts with the forum:

> "... due process requires *only* that in order to subject a defendant to a judgment in personam, if he be

> not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (Emphasis added) (Citations omitted).

The "minimum contacts" analysis of *International Shoe* considers the activities of the defendant within the forum in order to balance the exercise of jurisdiction against "[a]n estimate of the inconveniences which would result to the corporation from a trial away from its 'home' or principal place of business . . ." *Id.* at 317. The "minimum contacts" referred to in *International Shoe* are the contacts of the defendant, and not those of the plaintiff, who has elected to litigate in the forum. Thus, whether the lawsuit is commenced by a resident or a non-resident, defendants' "minimum contacts" with the forum are precisely the same in both circumstances. In *Shaffer* v. *Heitner,* 433 U.S. 186, 204 (1977), this Court pointed to "the relationship among the defendant, the forum, and the litigation" as "the central concern of the inquiry into personal jurisdiction." Later, in *World-Wide Volskwagen Corp.* v. *Woodson,* 444 U.S. 286, 292 (1980), the Court similarly emphasized "[t]he relationship between the defendant and the forum" as the test of reasonableness and identified other relevant factors, none of which included plaintiff's contacts with the forum. This Court has never included plaintiff's relationship with the forum as an element of the due process analysis. Such an omission was not accidental, as recently confirmed by this Court in *Rush* v. *Savchuk,* 444 U.S. 320 (1980).

Rush declared unconstitutional the line of cases typified by *Seider* v. *Roth,* 16 N.Y.2d 111 (1966), which permitted a resident to obtain *quasi in rem* jurisdiction over a non-resident by attaching the insurance company's obligation to

defend arising from the defendant's insurance policy. Criticizing the *Seider* variety of cases, this Court observed that "they shift the focus of inquiry from the relationship among the defendant, the forum and the litigation to that among the plaintiff, the forum, the insurer, and the litigation." *Id.* at 332. The Court concluded that this shift was neither intended nor permitted by the holding in *International Shoe*:

> "This subtle shift in focus from the defendant to the plaintiff is most evident in the decisions limiting Seider jurisdiction to actions by forum residents on the ground that permitting nonresidents to avail themselves of the procedure would be unconstitutional. *In other words, the plaintiff's contacts with the forum are decisive in determining whether the defendant's due process rights are violated.*
>
> *Such an approach is forbidden by International Shoe and its progeny.*" *Id.* (Emphasis added).

Abandoning all semblance of subtlety, the court below simply seized upon plaintiff's lack of contact with New Hampshire as the decisive factor in dismissing the lawsuit.

In addition, the Court of Appeals sought to justify its conclusion by observing that "New Hampshire has no special interest in protecting a nonresident against this out-of-state activity" (Pet. 18a). But there can be no doubt that a tort was committed in New Hamphire by the distribution there of the defamatory publications. The Supreme Court of New Hampshire expressly recognized the important state interest arising in such circumstances:

> "A state has an especial interest in exercising judicial jurisdiction over those who commit torts within

> its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort." *Leeper* v. *Leeper*, 114 N.H. 294, 298 (1974), quoting from Restatement 2d, Conflict of Laws Sec. 36, Comment e (1971).

The "especial interest" identified by the New Hampshire Supreme Court in *Leeper* is no less present in a defamation case. As the court in *Leeper* stressed, it is "wrongful conduct" which the State of New Hampshire seeks to deter —the state's "especial interest" in deterrence is not diminished by the limited extent of local damage caused by such wrongful conduct. The pivotal factor is *conduct*—whether the plaintiff has been damaged extensively or minimally in New Hampshire should not erode New Hampshire's resolve to deter tortious conduct wherever it may be found within state borders.

Were defendants citizens of New Hampshire, they could certainly be sued here. If defendants' home state is thus viewed as having an interest in policing the conduct of its residents, then surely there is an even greater interest in monitoring the affairs of those nonresidents who intrude themselves into the commerce of the forum and exploit its citizens for profit and commercial gain.

In extending the reach of its long-arm statute to the constitutional limit, New Hampshire reaffirmed its interest in exercising jurisdiction over tortious conduct, even in favor of lawsuits brought by nonresidents. Thus, in 1971, New Hampshire deleted from its long-arm statute (Pet. 20a) the requirement that a tort be committed "against a

resident of New Hampshire."* If the State of New Hampsire was concerned only with protecting its citizens or only with damages suffered within its borders, then its Legislature in 1971 would not have dropped the requirement that a tort be committed "against a resident of New Hampshire" in order to satisfy the long-arm statute, and its Supreme Court in 1974 would not in *Leeper* v. *Leeper* have focused solely on the issue of conduct when it defined New Hampsire's "especial interest" in deterring torts.

Furthermore, New Hampshire has an abiding interest in deterring criminal conduct. Defendants' activities in New Hampshire violate that state's criminal defamation statute, which makes it a misdemeanor if a person "purposely communicates to any person, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule." R.S.A. 644:11(A).

The court below indicated that the only obstacle blocking jurisdiction was its decision in *Seymour* v. *Parke, Davis & Co.*, 294 F. Supp. 1257 (D.N.H. 1969), *aff'd*, 423 F.2d 594 (1st Cir. 1970). This case presents facts far different from those which the court held insufficient to support jurisdiction in *Seymour;* moreover, this case falls within each of the two independent exceptions identified in *Seymour* as circumstances in which jurisdiction could be constitutionally exercised.

Seymour was an action for personal injury and wrongful death caused by a drug manufactured by the defendant pharmaceutical company. The contaminated drug was

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* Other states have not gone quite as far, and still maintain "door-closing" statutes (see 66 Colum. L. Rev. 377 (1966)) or residency requirements (see, e.g., Conn. Gen. Stat. Rev. §37-519(c) (1961); Minn. Stat. Ann. §303.13(3) (Supp. 1965)).

prescribed by a Massachusetts physician, purchased in a Massachusetts drug store and ingested by plaintiff's decedent in Massachusetts, where he lived at all times until his death.

In *Seymour,* the tort occurred in Massachusetts, whereas here the tort occurred in New Hampshire because the libel was published there. In *Seymour,* the only complaint about defendant's drug was with respect to the single dosage taken by plaintiff's decedent in Massachusetts. Here, the actual product complained of was in fact circulated in New Hampshire—some 50-75,000 copies of Hustler Magazine "contaminated" with the offensive libel were distributed throughout the state.

The district court in *Seymour* acknowledged that the case was one of "first impression", 294 F. Supp. at 1260, so that the ruling would be "limited to the facts of the instant case," *id.* at 1263. Central to the district court's decision was its conclusion that New Hampshire "has *absolutely no interest whatsoever* in the litigation". *Id.* (Emphasis added). However, in view of the subsequent decision of the New Hampshire Supreme Court in *Leeper* and the New Hampshire criminal defamation statute (not applicable in *Seymour*), New Hampshire has clearly identified its "especial interest" in deterring tortious and criminal conduct within its borders.

The *Seymour* case actually supports the exercise of jurisdiction here because of the due process guidelines enumerated by the First Circuit.

> "If the plaintiff has some attachment to the forum, or if the defendant has adopted the state as one of its major places of business, we would have no question of the right of the state to subject the defendant to suit for *unconnected causes of action. Nor would we even if the forum were not a major*

> *center of defendants' business but were nevertheless a comuunity into whose business life defendant has significantly entered as determined by the quality, substantiality, continuing and systematic nature of it activities.* When, however, defendant's only activities consist of advertising and employing salesmen to solicit orders, we think that fairness will not permit a state to assume jurisdiction." 423 F.2d at 586 (Emphasis added) (Citations omitted).

First, in this case the cause of action is *connected* to the forum because the libel occurred in New Hampshire. That alone under *Seymour* should satisfy the due process requirement of fairness. In *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 447 (1952), where *all* parties were nonresidents, this Court found that defendant's business activities were sufficient to permit an Ohio court to assert jurisdiction, even "where the cause of action arose from activities entirely distinct from its activities in Ohio."

Second, New Hampshire is certainly "a community into whose business life the defendant had significantly entered as determined by the quality, substantiality, continuity and systematic nature of its activities." To meet this test under *Seymour,* it is not required that New Hampshire be " a major center of defendants' business," but only a community into which the defendant has entered on a regular and substantial basis, as already found by the district court below (Pet. 5a). Defendants' interrogatory answers reveal that during the five months between November 1977 and March 1978, defendants distributed 94,050 copies of Hustler Magazine in New Hampshire, earning gross revenues of $235,125 ($2.50 per copy)

(81a-86a). Using that period as a typical five-month circulation figure, defendants since 1975 have distributed over 1,692,900 Hustler Magazines in New Hampshire, earning over $4,232,250 in gross revenues to date (on the basis of $2.50 per issue, although the cover price has since increased). This persistent exploitation of the New Hampshire market place surely qualifies as the kind of "significant" involvement contemplated by Seymour and demonstrates far greater activity than mere "advertising and employing salesmen to solicit orders," which was the only contact present in *Seymour*.

In a case jurisdictionally indistinguishable from this action, the New Hampshire district court exercised jurisdiction. *Galonis* v. *National Broadcasting Co.*, 498 F. Supp. 798 (D.N.H. 1980), was a defamation action brought in New Hampshire by a Pennsyvania citizen and Pennsylvania corporations against Delaware corporations with principal offices in New York. The court rejected defendants' argument that "venue in New Hampshire is improper because the damages (if any) incurred by the plaintiffs were national and not confined to New Hampshire . . ." *Id.* at 791. Thus, although the defendants in *Galonis* raised the issue of reputation damages caused by a nationwide defamation, the court entertained the lawsuit even though the primary situs of injury was arguably in Pennsylvania (plaintiff's state of residence) and the damages suffered in New Hampshire were no greater than that incurred in other jurisdictions. Significantly, the federal court exercised jurisdiction in *Galonis*, although New Hampshire has no more of an interest in that defamation case brought by a nonresident than it has in this litigation.*

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* This Court too has upheld jurisdiction in a case brought by a nonresident agianst a nonresident. *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

The risk of being sued in a foreign jurisdiction is not unexpected for a publisher who exploits a nationwide market. See *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 297 (1980); *McGee* v. *International Life Insurance Co.,* 355 U.S. 220, 223 (1957). The Fifth Circuit in *Curtis Publishing Co.* v. *Golino,* 383 F.2d 586, 590 (5th Cir. 1967), drew a sharp distinction between publications seeking a national audience and those geared primarily for local consumption. The Fifth Circuit warned that a careful publisher could eliminate all contacts, other than circulation, with most jurisdictions and thereby enjoy an immunity from suit in those forums "in spite of the pecuniary benefits gained in that very jurisdiction where it asserts it cannot be held legally accountable." *Id.* at 591.

> "Clearly it would not comport with notions of fair play and substantial justice to allow a business enterprise, whose overriding business purpose is maximum exploitation of the national market to be free from suit as a matter of law in all states but that of publication simply because physical contacts with the other states had been reduced to a minimum." *Id.*

If the risk of litigation is too great, the publisher can sever its connection with the jurisdiction or simply alleviate the risk by procuring insurance or otherwise passing along the expected costs to its customers. *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 297 (1980).

Even the New Hampshire district court has cautioned against erecting an "unreasonable barrier to lawsuits against foreign corporations, based not on the practicalities of the situation, but on legal formulas and fictions that bear no relationship to the facts of life in the 1970's."

Gill v. *Fairchild Hiller Corp.*, 312 F. Supp. 916, 918 (D.N.H. 1970). The New Hampshire district court recognized the price a publication must pay for the benefits of national circulation:

> "The risk of suit being brought against them in any one of the fifty states is one of the risks that defendants must bear because of the nature of their business." *Id.*

Nor does this subject defendants like Hustler to unpredictable and inconsistent results, for choice of law principles will uniformly select the appropriate substantive law to be applied, regardless of the situs of the litigation.

Accordingly, refusing to permit New Hampshire courts to exercise jurisdiction over the defendants in this case constitutes the very "subtle shift in focus" which is "forbidden by *International Shoe* and its progeny", *Rush* v. *Savchuk, supra,* at 332, and ignores the special risks and responsibilities imposed on the media as the price of doing business in an era where state lines have been obliterated by modern technology.

II

The confusing test formulated by the Court of Appeals unravels settled principles of due process analysis.

The opinions by the courts below have far-reaching consequences for every litigant who seeks to bring an action in a jurisdiction other than his home state. The opinions below have particular adverse consequences for libel plaintiffs in terms of limiting the available jurisdictions in which they can sue, with the possible hardship of compelling them to travel to the jurisdiction of the wrongdoer as the only available forum.

The decision of the First Circuit affirming the dismissal of this action is based solely on due process grounds—"that the federal constitution . . . would not permit New Hampshire to exercise jurisdiction over defendants in this instance" (Pet. 13a).* The First Circuit believed it would be constitutionally "unfair" to permit this lawsuit because of the special problems involved in a libel case (Pet. 18a). While "the plaintiff must recover the damages caused in all states in one single suit" (Pet. 17a), here, the court reasoned, "[n]early all the damages the plaintiff seeks arise from injury to her reputation outside of New Hampshire" (18a).**

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* There is no question that the New Hampshire long-arm statutes seek to extend jurisdiction over nonresidents to the fullest extent permitted by the federal constitution (Pet. 13a).

** The court ignored the fact that damages in a libel action are not limited to injury to reputation, but may also include "personal humiliation, and mental anguish and suffering" *Gertz* v. *Welch*, 418 U.S. 323, 350 (1974). See also *Time, Inc.* v. *Firestone*, 424 U.S. 448, 460-61 (1976).

The court thus recognized that plaintiff "is suing in part for damages suffered in New Hampshire" (Pet. 15a), but that it would be unfair to hold defendants responsible in a New Hampshire action for damages suffered outside of that state—"the New Hampshire tail is too small to wag so large an out-of-state dog" (Pet. 19a).* Keeton may not split her cause of action among several jurisdictions, and the policy behind the single publication rule requires a single lawsuit for multistate defamation; accordingly, the First Circuit affirmed the dismissal of the action in its entirety rather than permitting the case to proceed at least on the basis of damages suffered in New Hampshire.

The bizarre nature of this ruling becomes most apparent in the court's analysis of "fairness" under *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and its progeny. It is undisputed that an average of 10-15,000 copies of Hustler Magazine are distributed each month within New Hampshire (81a-86a). This commercial activity has been taking place on a regular basis since the inception of the publication in 1975.** As the district court found, these contacts "were not random, isolated or transitory" but

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* But this Court has suggested that a nonresident like Keeton can sue for injury suffered in any forum where a defendant "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." *World-Wide Volkswagen* v. *Woodson*, 444 U.S. 286, 298 (1980).

** Keeton complains about five separate issues of Hustler Magazine: September 1975, October 1975, The Best of Hustler No. 2 (published in late 1975), May 1976 and July 1976, so that between 50-75,000 copies distributed in New Hampshire are the subject of this lawsuit.

"purposefully directed at New Hampshire . . ." (Pet. 5a).* The defendants have therefore engaged in those acts by which they "purposefully avail [themselves] of the privilege of conducting activities with the forum state, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

Defendants' conduct in New Hampshire is no less purposeful because plaintiff was simultaneously harmed in other jurisdictions as well, nor does the extent of the harm caused Keeton in New Hampshire render the defendants' conduct any less tortious or any less purposeful. Certainly due process cannot prohibit New Hampshire from redressing such conduct at the behest of a nonresident and at the same time permit New Hampshire to redress such conduct at the behest of a resident.

Once these minimum contacts are factually established, the jurisdictional inquiry should have come to an end, and due process does not require further inquiry into plaintiff's relationship with the forum. *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 443 (1952); *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980). Yet the court below seized upon the dubious proposition that the reputation damages suffered by a non-resident can be apportioned from state to state, and concluded that it would be "unfair" to permit suit in a forum of minimal damage.

This Court has never embraced such an approach. While the place of injury may be an important factor in determining choice of law, it is no part of the personal juris-

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* This case is therefore distinguishable from the "fortuitous circumstance" and "isolated occurrence" of a single automobile sold in one state that happens to have an accident while passing through the forum state. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 295, 297 (1980).

diction equation under *International Shoe*. The First Circuit's pivotal distinction between damages suffered by Keeton in New Hampshire and damages suffered by her outside of that jurisdiction (Pet. 18a-19a) in conjunction with the "minimal" contacts of the defendants (Pet. 15a), improperly focuses upon the quantity of contacts and the amount of plaintiff's injury, contrary to analyzing the nature and quality of the contacts between the nonresident and the forum:

> "The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more a little less." *International Shoe Co.* v. *Washington, supra,* 326 U.S. at 319.

It is the purposeful nature of defendants' New Hampshire activities (Pet. 5a) which subjects them to jurisdiction there. While a publisher may claim that its forum circulation is confined to only 1% of its national market, that is no reason to restrict exposure to the quantity of business conducted in the forum. See, e.g., *Curtis Publishing Co.* v. *Golino,* 383 F.2d 586 (5th Cir. 1967).

The effect of this unusual holding is to either force a libel plaintiff to seek out the wrongdoer in his own jurisdiction or to limit the plaintiff to the forum of primary injury which, according to the courts below, is plaintiff's home state.* But this result totally ignores the purposeful acts of the defendants in causing plaintiff injury in New Hampshire. A consistent application of the rule created by the courts below would even render it "unfair" for plaintiff to sue in her home state and

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* Because Keeton is a New York resident, and New York's long-arm statute excepts a cause of action for defamation, Keeton would have no such choice. CPLR §302(a)(2)(3) (Pet. 22a).

seek to recover damages for the harm suffered in other jurisdictions, for there too the local "tail is too small to wag so large an out-of-state dog."

In support of its conclusion that it would be "unfair" to allow this action, the Court of Appeals cited the policies of penalizing "a plaintiff who sleeps on her rights" and the need to avoid subjecting a publisher to "the risk of suit covering all damage suffered everywhere as long as there is any state anywhere with a statute of limitations that has not expired" (Pet. 18a). These considerations have no application to Keeton, who vigorously pursued her rights both in Ohio and New Hampshire. Moreover, the policy which seeks to protect a publisher against the risk of interminable litigation simply does not apply where the publisher has been put on notice of plaintiff's grievance and is aware that plaintiff is actively pursuing her rights.

CONCLUSION

This case presents an egregious example of a federal court's impermissible application of the due process clause to infringe upon a state's exercise of jurisdiction. Although the State of New Hampshire has enacted a long-arm statute which embraces jurisdiction over the defendants in this action, and even the federal courts would have permitted New Hampshire to exercise jurisdiction if the plaintiff was a resident, the court below incongruously held that allowing jurisdiction here would somehow be "unfair" to the defendants merely because of the fortuitous circumstance of plaintiff's nonresidence.

The application of the principles outlined by this Court in *International Shoe* and its progeny yields predictable jurisdictional results once the "minimum contacts" test has

been met. However, according to the court below, where the plaintiff is a nonresident, satisfying the "minimum contacts" test does not end the jurisdictional inquiry, but begins a new inquiry that involves an impractical weighing of whether defendants' contacts are sufficient to overcome the factor of plaintiff's nonresidence. This novel and unworkable doctrine, invoked only where plaintiff is a nonresident of the forum, destroys the threshold standard of "minimum contacts" which at least guaranteed consistent results under *International Shoe*, and substitutes in its place another layer of unnecessary analysis which will lead to chaos in the jurisdictional inquiry.

The confusing consequences of this decision require that the judgment of the First Circuit Court of Appeals should be reversed and the action reinstated.

Respectfully submitted,

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